

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

Case No. _____

EXCELSIOR MEDICAL CORP.,

Plaintiff,

v.

IVERA MEDICAL CORP.,
ROBERT F. LAKE, JR., and
JEFFREY S. TENNANT,

Defendants.

JURY DEMAND

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff Excelsior Medical Corp. (“Excelsior”) for its Complaint against defendants Ivera Medical Corp. (“Ivera”), Robert F. Lake, Jr. (“Lake”), and Jeffrey S. Tennant (“Tennant”) (collectively, the “Defendants”) hereby alleges as follows:

NATURE OF ACTION

1. This action arises under the patent laws of the United States, 35 U.S.C. § 1 *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and seeks a declaration that the claims of U.S. Patent No. 7,282,186 (the “’186 patent”) are not infringed by Excelsior and/or are invalid under 35 U.S.C. §§ 101 *et seq.*

THE PARTIES

2. Excelsior is a corporation organized under the laws of the State of Delaware, having a principal place of business at 1933 Heck Avenue, Neptune, New Jersey 07753.

3. Upon information and belief, Defendant Ivera is a corporation organized under the laws of the State of California, having a principal place of business in Carlsbad, California.

4. Upon information and belief, Defendant Lake, an individual, is a domiciled-resident of the State of Florida, County of Palm Beach.

5. Upon information and belief, Defendant Tennant, an individual, is a domiciled-resident of the State of Florida, County of Palm Beach.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 (Federal Question) and 1338(a) (Patents) because the action involves claims arising under the Patent Laws of the United States, 35 U.S.C. § 1 *et seq.*

7. This Court may declare the rights and other legal relations of the parties pursuant to 28 U.S.C. §§ 2201 and 2202 (Declaratory Judgment) because this is a case of actual controversy within the Court's jurisdiction.

8. This Court has personal jurisdiction over Ivera both generally and specifically because, among other reasons, Ivera has engaged in substantial and not isolated activity within this District. On information and belief, Ivera has continuous and systematic general business within the State of Florida in that, at a minimum, Ivera has conducted sales, participated in trade show(s), and maintained employee(s) within the State of Florida. Additionally, Ivera has entered into contractual relations with Lake and Tennant within this State, which formed the basis of its alleged patent rights asserted against Excelsior.

9. This Court has personal jurisdiction over Lake both generally and specifically because he resides within this District.

10. This Court has personal jurisdiction over Tennant both generally and specifically because he resides within this District.

11. Venue is appropriate in this Court because the Defendants are subject to personal jurisdiction in this District and because defendants Lake and Tennant reside in this District. 28 U.S.C. §§ 1391(b), 1391(c), and 1400(b).

BACKGROUND

12. Excelsior is a leading manufacturer and supplier of products used in the medical field, including a luer access valve disinfection cap sold under the trademark SwabCap.

13. Ivera manufactures, markets, and sells Curos® Port Protector, a device that Ivera alleges disinfects and protects the entry port on certain types of valves used with intravenous lines to help reduce bloodstream infections in hospital patients.

14. The '186 patent was issued on October 16, 2007 to Lake and Tennant. A true and correct copy of the '186 patent is attached hereto as **Exhibit A**.

15. Ivera alleges to be the exclusive licensee of '186 patent.

THE CONTROVERSY

16. On February 27, 2013, Ivera filed a complaint for patent infringement against Excelsior in the United States District Court for the Southern District of California. The case is captioned *Ivera Medical Corp. v. Excelsior Medical Corp.*, Civil Action No. 13-cv-00465-H-RBB (the "California Action").

17. In its complaint, Ivera alleges that Excelsior has used, offered for sale, sold, and/or imported into the United States products which literally and under the doctrine of equivalents infringe one or more claims of the '186 patent, which Ivera alleges it has the authority to enforce pursuant to a license agreement with Lake and Tennant.

18. In response to the complaint, Excelsior asserted counterclaims for declaratory judgment of non-infringement and invalidity of the '186 patent against Ivera.

19. The inventors and owners of the '186 patent, Lake and Tennant, are not parties in the California Action.

20. On August 22, 2013, Excelsior moved to dismiss Ivera's complaint in the California Action pursuant to Fed. R. Civ. P. 12(b)(1) for failing to join Lake and Tennant as co-plaintiffs.

21. Excelsior's motion to dismiss Ivera's complaint in the California Action also will have the effect of dismissing Excelsior's counterclaims against Ivera. As Lake and Tennant were not joined in the California Action, Excelsior's existing counterclaims were not asserted against Lake and Tennant as counterclaim defendants.

22. As a result of Ivera's claims of infringement in the California Action, there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality that Excelsior will be imminently sued by one or more Defendants for infringement of one or more claims of the '186 patent, even once the California Action is dismissed, because Lake and Tennant would not be bound by any such dismissal and Ivera may retain the right to re-file.

23. Because Excelsior's counterclaims will be dismissed in the California Action, there will be no pending claims between any of the parties concerning the subject matter of this complaint.

24. Accordingly, there is an actual, substantial and continuing justiciable case and controversy between Excelsior and Defendants regarding the '186 patent, over which this Court can and should exercise jurisdiction, and declare the rights of the parties.

25. Excelsior is therefore entitled to bring and maintain this action for declaratory judgment. 28 U.S.C. § 2201.

COUNT I
(Declaratory Judgment of Non-Infringement of the '186 Patent)

26. Excelsior incorporates the allegations of paragraphs 1-25 as if set forth herein in full.

27. Excelsior has not and is not infringing, either literally or under the Doctrine of Equivalents, any valid and/or enforceable claim of the '186 patent.

28. Excelsior is therefore entitled to a declaratory judgment that it has not and is not infringing any valid and/or enforceable claim of the '186 patent.

COUNT II
(Declaratory Judgment of Invalidity of the '186 Patent)

29. Excelsior incorporates the allegations of paragraphs 1-28 as if set forth herein in full.

30. One or more claims of the '186 patent are invalid for failure to meet one or more of the statutory requirements for patentability set forth in 35 U.S.C. §§ 101 *et seq.*

PRAYER FOR RELIEF

WHEREFORE, Excelsior respectfully requests the Court enter judgment against Defendants to include:

- A. Declaring that Excelsior has not infringed, either directly or under the Doctrine of Equivalents, any valid and enforceable claim of the '186 patent;
- B. Declaring that the claims of the '186 patent are invalid; and
- C. Awarding Excelsior all other such relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Excelsior hereby demands a jury trial as to all issues that are so triable.

Respectfully Submitted,

Dated: August 22, 2013

By: /s/Scott G. Hawkins
Scott G. Hawkins
James C. Gavigan, Jr.
JONES, FOSTER, JOHNSTON & STUBBS, P.A.
Flagler Center Tower
505 South Flagler Drive, Suite 1100
West Palm Beach, Florida 33401
(561) 659-3000
Fax: (561) 650-5300

OF COUNSEL:
Michael R. Friscia
Mark H. Anania
MCCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-4444

*Attorneys for Plaintiff
Excelsior Medical Corporation*